

FEDERAL COURT OF AUSTRALIA

Borsa v Minister for Immigration & Multicultural Affairs [1999] FCA 348

MIGRATION – judicial review – application for permanent residence – whether Immigration Review Tribunal gave adequate reasons for affirming decision to refuse application for visa.

Migration Act 1958 (Cth) ss 65, 368(1)
Migration Regulations 1993, cl 820.721(1)(b), 820.731(1)(b)

Surinakova v Minister for Immigration, Local Government and Ethnic Affairs (1991) 33 FCR 87 referred to
Simpson v Minister for Immigration and Ethnic Affairs (1994) 35 ALD 389 referred to
Jones v Minister for Immigration and Ethnic Affairs (1995) 63 FCR 32 distinguished
Muralidharan v Minister for Immigration and Ethnic Affairs (1996) 62 FCR 402 referred to
Logenthiran v Minister for Immigration and Multicultural Affairs (Full Court, Federal Court of Australia, 21 December 1998) referred to
Paramanathan v Minister for Immigration and Multicultural Affairs (1998) 160 ALR 24 referred to

**IOANA BORSA v MINISTER FOR IMMIGRATION AND
MULTICULTURAL AFFAIRS**

WG 104 of 1998

**LEE, CARR & MERKEL JJ
31 MARCH 1999
PERTH**

**IN THE FEDERAL COURT OF AUSTRALIA
WESTERN AUSTRALIA DISTRICT REGISTRY**

WG 104 of 1998

On appeal from a single Judge of the Federal Court of Australia

**BETWEEN: IOANA BORSA
Appellant**

**AND: MINISTER FOR IMMIGRATION AND
MULTICULTURAL AFFAIRS
Respondent**

JUDGES: LEE, CARR & MERKEL JJ

DATE OF ORDER: 31 MARCH 1999

WHERE MADE: PERTH

THE COURT ORDERS THAT:

1. The appeal be allowed.
2. The orders made on 17 July 1998 be set aside.
3. The decision of the Immigration Review Tribunal made on 13 November 1997 be set aside.
4. The appellant's application, made on 9 August 1996, to the Immigration Review Tribunal for review of the respondent's decision, made on 8 July 1996, be remitted to the Tribunal, differently constituted, for determination according to law.
5. The respondent pay the appellant's costs of the appeal and at first instance.

NOTE: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules.

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BETWEEN: **IOANA BORSA**
 Appellant

AND: **MINISTER FOR IMMIGRATION AND**
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 Respondent

JUDGES: **LEE, CARR & MERKEL JJ**

DATE: **31 MARCH 1999**

PLACE: **PERTH**

REASONS FOR JUDGMENT

THE COURT:

Introduction

- 1 This is an appeal from a decision of a judge of this Court, given on 17 July 1998, dismissing the appellant's application for an order of review of a decision of the Immigration Review Tribunal ("the Tribunal") dated 13 November 1997. The Tribunal affirmed a decision by a Migration Internal Review Officer who had, on 8 July 1996, affirmed the primary decision of a delegate of the respondent, made on 20 December 1995, not to grant the appellant a transitional (temporary) visa. The appellant's application for such visa was based on her marriage to an Australian citizen.

Factual Background

- 2 The appellant is a 58 year old Romanian national who arrived in Australia on 29 April 1993 under a visitor visa. On arrival she obtained an entry permit allowing her to remain until 29 April 1994. At that time two of her four adult children resided in Australia, one being an Australian citizen and the other entitled to reside permanently. On 14 November 1993 the appellant married Mr Stefan Viorel Borsa, an Australian citizen. On 24 January 1994 the appellant applied to remain permanently in Australia under a Class 820 (Extended

Eligibility (Spouse)) entry permit (“spouse EP”). By the application of Reg. 23 of the Migration Reform (Transitional Provisions) Regulations, an application for such a visa is to be taken to be an application for a transitional (temporary) visa. However, the application is still to be decided according to the criteria which applied to a spouse EP. In April and December 1994 the two remaining children of the applicant migrated from Romania to Australia, with the right to reside here permanently. At that time the appellant had five grandchildren residing in Australia.

The Statutory Framework

- 3 Section 65 of the *Migration Act* 1958 (Cth) (“the Act”) relevantly provides that if, after considering a valid application for a visa, the respondent is satisfied that, amongst other matters, the criteria prescribed by the regulations have been satisfied, he is to grant the visa. The criteria prescribed for the grant of a spouse EP may be found in Part 820 of Schedule 2 to the Migration (1993) Regulations. The criterion relevant to this matter, which had to be satisfied at the time of application, was that:

“the marital relationship between the applicant and the Australian citizen or Australian permanent resident ... is both genuine and continuing;”

[see clause 820.721 (1)(b)].

- 4 The relevant criterion which had to be satisfied at the time of the Tribunal’s decision was that the appellant “... continue(d) to meet the requirements of the applicable subclause ...” – see clause 820.731(1)(b), i.e. that the marital relationship between her and Mr Borsa continued to be both genuine and continuing. The requirements can thus be seen as cumulative.

The Tribunal’s Reasons

- 5 The Tribunal first referred to the matters which we have set out in the introduction and factual background above. It also referred to, and set out in full, the relevant portions of the regulations. The Tribunal then noted that it had before it the contents of the departmental file together with various submissions and other documents. Included among these was a statutory declaration from Mr Borsa. In that document Mr Borsa declared that

after their wedding he and the appellant moved in with the appellant's son and his wife at Unit 5, 81 Calais Way, Scarborough and had lived there until approximately February 1994. In February 1994, so Mr Borsa declared, they moved to leased premises at Unit 9, 4 Heppingstone Street, South Perth. Mr Borsa also declared that he had gone to Romania in 1994, 1995 and 1996 without his wife and stated the reasons for that occurring.

- 6 The Tribunal noted that the appellant had told it that her husband was in Australia for the whole time during the period between their meeting in Australia some two to three months after her arrival (they had known each other in Romania many years before) and their wedding. However, immigration records before the Tribunal showed that Mr Borsa was not in Australia for about nine weeks between 18 June 1993 and 24 August 1993 and again between 26 October 1993 and 12 November 1993. [The Tribunal had put these matters to the appellant at the hearing before it].
- 7 In relation to the lease of the South Perth unit, the Tribunal observed that it was signed in the name of Mr Borsa only and that it stipulated that the unit was to be occupied by one person only.
- 8 The Tribunal referred to a statement made on 25 November 1994 by a Ms B M Markham, the Property Manager who had handled the lease of the South Perth unit. Ms Markham had stated that the lease was for one person only. She also said that during an inspection on 27 June 1994, she had noted that the unit appeared to be occupied only by one man. The Tribunal said that this evidence had been brought to the attention of Mr Borsa at the hearing. His response had been that it was always his intention that he and the appellant would live at the unit, although he could not remember what he had discussed with Ms Markham.
- 9 The Tribunal then referred to a letter dated 24 February 1997, received via the appellant's solicitors, in which a Ms Rowbotham stated that she had visited the appellant and Mr Borsa on quite a few occasions at the South Perth unit and it was obvious to her that the appellant was living there. In evidence to the Tribunal Ms Rowbotham described herself as "a sex industry worker" and said that Mr Borsa was her client. She said that she saw the couple every couple of weeks and that they appeared "very stable".

10 Before the Tribunal also was a note dated 18 January 1995 from the Department of Social Security (“DSS”) to the Department of Immigration and Ethnic Affairs (“the Department”) which stated that Mr Borsa had, on 2 December 1994, informed the DSS that he had moved from his address at South Perth about two months previously “when he separated from his wife”. Mr Borsa had told the DSS that although he hoped to get back together again “there now appears to be no chance of that”. This evidence was put to Mr Borsa by the Tribunal at the hearing. In a supporting letter, undated, but sent to the Tribunal by the appellant’s solicitors on 27 February 1997, Mr Borsa stated that at the relevant time he had experienced a few arguments with his wife concerning the time she spent with her grandchildren, but that he and the appellant were living together.

11 The Tribunal also noted that the appellant’s application was supported by statutory declarations from her daughters which described her relationship with Mr Borsa.

12 The Tribunal set out its understanding of the legislative requirement that the appellant and Mr Borsa not only be legally married but also be living in a genuine and continuing relationship, both at the time of lodgment of the original application and at the time when the Tribunal made its decision. The Tribunal said that the issue of whether a marital relationship was a genuine and continuing one was a question of fact to be determined on the circumstances of the case taking into consideration the various facets of the relationship as indicated by the evidence.

13 The Tribunal then said:

“When the whole of the evidence has been considered against the statutory requirements and the Tribunal is left in a state of uncertainty as to whether the facts necessary to activate the relevant statutory power have been established it must decide against the exercise of the power.

On the evidence the Tribunal is satisfied that some form of relationship exists between the Applicant and Mr Borsa. That relationship may even be on balance an intimate one although the Tribunal makes no finding on the issue. However having carefully considered the evidence and having regard to the inconsistencies referred to above the Tribunal is unable to reach a finding of fact that the couple’s relationship may be described as a genuine and continuing one between two spouses.”

14 The Tribunal supported this conclusion, first, by referring to the appellant's evidence relating to the time which she had spent with her husband during the period leading to their marriage which it described as "not convincing".

15 The Tribunal also found that the terms of the lease in respect of the South Perth unit, corroborated by Ms Markham's statement, flew in the face of the evidence of the appellant and Mr Borsa that they lived there together. The Tribunal said that it preferred to rely on the terms of the lease and Ms Markham's statement, rather than the evidence of the appellant, Mr Borsa or Ms Rowbotham.

16 In the Tribunal's expressed view, what it described as "all these inconsistencies" were readily apparent from the Department's file. It noted that the appellant's solicitors were concerned with these inconsistencies after examining the files on 18 November 1996, because in a letter dated 20 December 1996 to the appellant (the text of which the Tribunal set out in its reasons) they had identified the following issues to be of concern:

- "1. the lack of evidence of joint management of usual household arrangements which generally evidence the required commitment. In the alternative, the lack of explanation as to why there are no joint arrangements;*
- 2. the lack of clear instructions provided by you as to the situation in relation to the residence at South Perth;.*
- 3. the information provided by Mrs (sic) Borsa to the Department of Social Security;*
- 4. the frequent overseas trips made by Mr Borsa for various family and business commitments."*

17 The Tribunal referred to a letter from the appellant's solicitor dated 29 May 1997 responding to those matters. In that letter the solicitors asserted that the appellant and Mr Borsa were in a continuing marital relationship. They sought to explain the sole tenancy of the South Perth unit on the basis that Mr Borsa had been rejected when previously applying for accommodation for two people. The communications with the DSS were partially explained by reference to difficulties between the couple at the time in relation to the large amount of time spent with the appellant's family, and that Mr Borsa was consuming large quantities of alcohol at the time. The appellant's solicitors stated that

their instructions were that at no time had the appellant and Mr Borsa separated.

18 The Tribunal concluded its reasons in these terms:

“For reasons discussed above the Tribunal is still left in a state of uncertainty on the issue of whether the Applicant and Mr Borsa share a relationship which may be described as a genuine and continuing relationship between husband and wife. This means that the facts necessary to activate an exercise of the relevant statutory power has (sic) not been established. To use the words of His Honour Mr Justice Carr in the decision of Ester Jones v The Minister of State for Immigration and Ethnic Affairs (Full Federal Court, unreported, 6 December 1995) ‘[t]he decision-making pendulum remained in equilibrium’.

For those reasons the Applicant has failed to satisfy one of the prescribed criteria relevant to the grant of a spouse EP. As all the prescribed criteria must be satisfied before the entry permit sought may be granted this application must necessarily fail.

The Tribunal affirms the decision under review.”

The Proceedings at First Instance in this Court

19 The appellant relied upon some five grounds of review before the learned primary judge. Although there were originally six grounds of appeal against his Honour’s decision, the only ground of appeal upon which the appellant now relies is that the primary judge erred in law in finding that the Tribunal had complied with s 368(1) of the Migration Act 1958 (Cth) (“the Act”).

20 Section 368(1) of the Act provides:

368 (1) *Where the Tribunal makes its decision on a review, the Tribunal must, subject to paragraph 375A(2)(b) prepare a written statement that:*

- (a) sets out the decision of the Tribunal on the review;*
- (b) sets out the reasons for the decision;*
- (c) sets out the findings on any material questions of fact; and*
- (d) refers to the evidence or any other material on which the findings of fact were based.*

[Section 375A(2)(b) has no relevance to the present matter.]

21 His Honour set out in his reasons a detailed description of the Tribunal’s reasons. In that

part of those reasons in which his Honour dealt with this particular complaint, he set out the text of s 368, summarised the appellant's arguments and then reviewed the authorities, which included *Man Ki Kim v Minister for Immigration and Ethnic Affairs* (1995) 37 ALD 481; *Politis v Federal Commissioner of Taxation* (1988) 16 ALD 707 at 708; *Barry Rogers & Co Pty Ltd v Minister for Immigration & Ethnic Affairs* (1995) 35 ALD 197 at 202; *Minister for Immigration & Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259; *Muralidharan v Minister for Immigration & Ethnic Affairs* (1996) 62 FCR 402 at 413-414; *Mohamed v Minister for Immigration & Ethnic Affairs* (Hill J, Federal Court of Australia, 11 May 1998 unreported) and *Jones v Minister for Immigration and Ethnic Affairs* (1995) 63 FCR 32. His Honour expressed his conclusions as follows:

"... I do not consider the Tribunal failed to fulfil its obligation to comply with the requirements of s 368(1) of the Migration Act. The Tribunal was not obliged to refer to or particularise all the evidence before it. There was evidence before it, particularly that concerning the living arrangements in relation to the South Perth unit and inconsistencies in the applicant's evidence relating to the time she spent with her husband leading up to their wedding, upon which it could base its decision. Its decision was reached by reference to a state of uncertainty. That state was the product of the particular evidence referred to.

The reference by the Tribunal to the relationship possibly being on balance an intimate one and its failure to make findings on the issue was apparently responsive to the nature of the evidence before it. While doubtless more complete reference to the evidence upon which this ground is based would have more readily captured the confidence of those reading the reasons of the Tribunal had the reasons adverted to all relevant evidence, the Tribunal was under no obligation to recite the evidence in that way and there was evidence upon which it could base its conclusion. Its reasoning was disclosed. It did not find the evidence for the applicant credible in a number of respects. In my opinion this ground is not made out."

Appellant's Submissions

- 22 The appellant complained that the Tribunal had failed to make the necessary findings of fact, particularly as to the nature and quality of the relationship between the appellant and Mr Borsa, and then to apply the law correctly to such findings. In relation to the oral evidence given to it, the Tribunal had made "the merest mention" of the evidence of a Mr Vasile Timis without any reference to its content. Mr Timis is the appellant's son with whom she and her husband lived immediately after their wedding. The appellant submitted that his evidence was "relevant and supportive" of her case. There had been, so it was put,

no assessment of that evidence or of the credibility of Mr Timis. The assessment of the remaining oral and written evidence had been confined to two paragraphs of the Tribunal's reasons. Credibility findings were limited to a comment that the appellant's evidence relating to the time which she spent with her husband leading to their wedding was "not convincing", and secondly a preference for the terms of the lease and Ms Markham's statement over the evidence of the appellant, Mr Borsa and Mrs Rowbotham. The appellant complained further that the Tribunal had made no reference at all to what the appellant described as important and probative evidence from:

- the Very Reverend Milan Soactor (the priest who had officiated at the wedding);
- Dr Dan Cojocaru (the family doctor); and a
- Mr John Harrison (who had written to the Tribunal).

23 We were taken to the evidence of those persons, which relevantly was to the effect that the appellant and Mr Borsa resided together, regularly attended social and community functions together and were in a marital relationship which was both genuine and continuing. The appellant complained that the Tribunal's reasons mentioned statutory declarations by her daughters, which similarly described the marital relationship, without referring to the contents of those statutory declarations or making any assessment of them. Each of those declarations was said to be relevant and significant to the central issue, being the nature of the marital relationship at the time of application and at or about the date of the Tribunal's review. The result was, so the appellant submitted, that the Tribunal's treatment of the evidence, in its reasons, was inadequate and constituted a failure to refer to the evidence on which its findings of fact were based. The Tribunal had not imposed on itself the intellectual discipline which was part of the preparation of adequate reasons – a reference to the observations of Sheppard J in *Commonwealth v Pharmacy Guild of Australia* (1989) 91 ALR 65 at 88.

Respondent's Submissions

24 The respondent contended that the Tribunal had, in its reasons, dealt quite extensively with the issue of whether or not the appellant and Mr Borsa were in a genuine and continuing relationship. The Tribunal had referred to inconsistencies in the evidence, as a result of

which it stated that it had been left in a state of uncertainty on that issue. The respondent submitted that it was clear from the Tribunal's reasons as a whole, that it had complied with the requirements of s 368(1) of the Act. Those reasons clearly indicated, so it was put, the basis of the Tribunal's decision, namely its lack of satisfaction that the marital relationship of the appellant and Mr Borsa was both genuine and ongoing, and the inconsistencies in the evidence which gave rise to that lack of satisfaction. The respondent contended that the evidence of the Very Reverend Soactor, Dr Cojocaru, Mr Harrison and the appellant's daughters did not help to clarify the inconsistencies noted by the Tribunal. Counsel for the respondent took us to other inconsistent evidence before the Tribunal. The respondent submitted that the extent of the inconsistencies in the evidence and material on the matters referred to by the Tribunal in its reasons provided ample basis for its conclusion that it was left in a state of uncertainty as to whether the appellant and Mr Borsa shared a relationship which could be described as genuine and continuing. The Tribunal's reasons, so it was submitted, left no doubt as to how and why it reached that conclusion. Its failure to refer to specific details of the evidence of the Very Reverend Soactor, Dr Cojocaru, Mr Harrison and the appellant's daughters did not, in those circumstances, constitute a breach of the requirements of s 368(1) of the Act.

Our Reasoning

- 25 The Tribunal's task was to decide, first, whether the relationship between the appellant and Mr Borsa was both genuine and continuing as at the time when the appellant lodged her application (24 January 1994) and, secondly, whether at the time whether the Tribunal made its decision, the marital relationship continued to be both genuine and continuing. As mentioned above, the date of decision was 13 November 1997. Although the latest piece of evidence obtained by the Tribunal would appear to be the letter dated 29 May 1997 to it from the appellant's solicitors, for present purposes, there is no need to distinguish between the situation as at that date and as at the date upon which the Tribunal affirmed the decision under review, some six months later.
- 26 The evidence shows that at the time when the appellant lodged her application to remain permanently in Australia, she and Mr Borsa were living in Mr Timis' apartment in Scarborough. The Tribunal appears (at p 7 of its reasons) to have made a finding to that effect. The question whether the marital relationship between the appellant and Mr Borsa

was both genuine and continuing as at 24 January 1994 would remain a material question of fact unless the Tribunal found as a fact that at the date of the Tribunal's decision the marital relationship was not then genuine and continuing. The Tribunal recognised that at p 9 of its reasons. However, nowhere in its reasons does the Tribunal set out its finding on either question of fact. The Tribunal can be seen (particularly at pp 11-13 of its reasons) to have focussed on the then current relationship. When it engaged in that process, the Tribunal concentrated on the relationship as it existed during the six month period of the lease of the unit in South Perth i.e. from 2 May 1994. Such an approach by the Tribunal would not necessarily bespeak an error of law, for example, events which occurred after 24 January 1994 might demonstrate whether there was a genuine, continuing relationship at that date or at the date of the decision – see *Surinakova v Minister for Immigration, Local Government and Ethnic Affairs* (1991) 33 FCR 87 at 94; *Simpson v Minister for Immigration and Ethnic Affairs* (unreported, Heerey J, Federal Court of Australia, 29 August 1994, Judgment No 591 of 1994 at p3). The particular character of events even though distant from either date may nonetheless support a conclusion that the marital relationship was neither genuine nor continuing at the date of application or at the date of the decision. The Tribunal did not reach such a conclusion. It simply expressed a preference for the evidence contained in the terms of the lease and that given by Ms Markham over the evidence of the appellant and Mr Borsa that they lived in the South Perth unit together. This had the result that the Tribunal said that it was left in a state of uncertainty on the issue of whether the appellant and Mr Borsa "... share a relationship which may be described as a genuine and continuing relationship between husband and wife." That is clearly a reference to the then present state of that relationship. But the tenancy of the South Perth unit had come to an end about three years earlier. The Tribunal made no assessment of the evidence before it that the appellant and Mr Borsa had in August 1994 moved in with the family of one of the appellant's daughters and then, in approximately April 1995, had obtained rental accommodation from Homeswest where they were still living together. When the Tribunal relied upon *Jones*, it did so in error. *Jones* was a very different case. *Jones* was an exceptional case in which, after deciding to disbelieve all of the applicant's evidence, the Tribunal had no material upon which to decide that there was a genuine and continuing relationship between Mr and Mrs Jones. In the present case there were no findings at all in respect of the evidence adduced through the appellant's son and three daughters and the three other witnesses identified above. Here, it was the Tribunal's duty, if it intended to reject or give no weight to that evidence, to refer

to it and explain why it rejected or gave no weight to the evidence. As Sackville J observed (with the concurrence of Davies and Beazley JJ) in *Muralidharan v Minister for Immigration and Ethnic Affairs* (1996) 62 FCR 402 at 414, the predecessor of s 368(1) did not require a Tribunal to prepare lengthy reasons dealing with every aspect of the evidence. It was enough that the findings and reasons deal with the substantial issues on which the case turned. See also *Logenthiran v Minister for Immigration and Multicultural Affairs* (Full Court, Federal Court of Australia, 21 December 1998) at p 13 and *Paramananthan v Minister for Immigration and Multicultural Affairs* (1998) 160 ALR 24 at 56 and 63 (another decision of a Full Court of this Court). In *Paramananthan* (which involved a relevantly identical provision of the Act) Wilcox J said (at 27):

“One of the purposes [of s 430] is to ensure that unsuccessful applicants for a protection visa are told why their application has failed; if the reason, or one of the reasons, was that the tribunal rejected a significant factual claim, the tribunal must say so and indicate the factual material on which the adverse finding was based.”

- 27 It is common ground that the Tribunal had no obligation to make findings about every factual matter raised by the appellant. However, the factual circumstances of the appellant’s relationship with Mr Borsa as at 24 January 1994 and as at the date of the Tribunal’s decision were at the very core of materiality. In our opinion, it was not open to the Tribunal to take the course which it did and say that “... the decision-making pendulum remained in equilibrium” when it had not placed all this other evidence onto the balance or rejected it as incredible, or as having no weight and made findings in accordance with s 368(1) to that effect. We accept the appellant’s submission, in oral argument, that the Tribunal moved too quickly to its “state of uncertainty” conclusion. It had not completed its task of finding the primary facts. Failure to make a finding on a material question of fact constituted failure to observe the procedure which s 368(1) required the Tribunal to observe and thus gives rise to review under s 476(1)(a): see *Paramananthan* at 37 and 63 and the further cases cited at the latter page. The respondent did not argue to the contrary on that point. The appellant suggested that his Honour may have misunderstood (at p 7 of his reasons) the requirement that the criteria be applicable not only at the time of the application but also as at the date of the decision. If so, then that can be seen to have resulted from the manner in which the case was fought at first instance. In any event, in my view it is not necessary to decide whether his Honour held that opinion. It can be seen

from the last paragraph of his Honour's conclusions on this particular point that he had some reservations about the adequacy of the Tribunal's reasons. It is also true, as his Honour stated, that there was evidence upon which the Tribunal could base its conclusion. Where we respectfully differ from his Honour is in relation to the conclusion that the Tribunal had complied with the requirements of s 368(1) of the Act.

Conclusion

- 28 For the foregoing reasons, we would allow the appeal, set aside the decision at first instance and remit the matter to a Tribunal, differently constituted, for consideration and determination in accordance with the law. The respondent should pay the appellant's costs of the appeal.

I certify that the preceding twenty-eight (28) numbered paragraphs are a true copy of the Reasons for Judgment of the Court.

Associate:

Dated: 31 March 1999

Counsel for the appellant: Mr W Martin QC with Mr S Walker

Solicitors for the appellant: Messrs Cannon Bowden & Co

Counsel for the respondent: Mr P Macliver

Solicitors for the respondent: Australian Government Solicitor

Date of Hearing 2 March 1999

Date of Judgment: 31 March 1999